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No. 77-1778

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

MICHAEL EDWARD GUIFFRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

**JULIUS LUCIUS ECHELES
CAROLYN JAFFE**

35 East Wacker Drive
Chicago, Illinois 60601

Attorneys for Petitioner

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Petitioner, Michael Edward Guiffre, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, No. 77-1724, not yet reported, is reprinted as an Appendix hereto.

Jurisdiction

The opinion of the Court of Appeals was entered May 19, 1978. No petition for rehearing having been filed, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Does 18 U.S.C. 2113(b) prohibit property offenses not amounting to common law larceny?

A. The Seventh Circuit's decision, following the view of the Second and Fifth Circuits [in *United States v. Fistel*, 460 F.2d 157 (2 Cir. 1972), and *Thaggard v. United States*, 354 F.2d 755 (5 Cir. 1965)], is in direct conflict with decisions of the Fourth and Ninth Circuits [in *United States v. Rogers*, 289 F.2d 433 (4 Cir. 1961), *LeMasters v. United States*, 378 F.2d 262 (9 Cir. 1967), and *Bennett v. United States*, 399 F.2d 740 (9 Cir. 1968)], with respect to the construction and scope of the identical statute, 18 U.S.C. 2113(b).

B. On such an important matter of statutory construction of a federal criminal statute, whereby conduct deemed a federal offense in the Second, Fifth and Seventh Circuits is wholly outside the scope of the same statute in the Fourth and Ninth Circuits, should not the issue be resolved by this Court, in order to assure uniformity of application of the federal law?

2. Does mis-designation of the theft offense in the judgment order as "robbery" vitiate the conviction?

Statute Involved

The statute here at issue, 18 U.S.C. 2113(b), provides, in pertinent part, that:

"Whoever takes and carries away, with intent to steal or purloin, any property or money of any other thing of value exceeding \$100.00 belonging to, or in the care, custody, control, management, or possession or any bank, . . ."

is guilty of a federal offense.

Statement of the Case

Petitioner, Michael Edward Guiffre was charged with having violated 18 U.S. Code 2113(b) by taking and carrying away with intent to steal approximately \$22,792.77, by presenting false checks for payment at a federally insured bank. Following a bench trial on agreed facts, the court found petitioner guilty and sentenced him to 6 months imprisonment followed by 2½ years probation.

Per the agreed facts (R. 23, Tr. 3-27),¹ petitioner utilized several legitimate accounts at the bank for purposes of cashing, depositing, and withdrawing monies derived from stolen checks, with a bank teller being privy to the scheme. (Tr. 18-19)

The Seventh Circuit panel affirmed, remanding with directions.²

Statement of Facts

The facts were agreed to by the parties, the only issue being whether petitioner's agreed conduct fell within the statute; for while petitioner's conduct may have amounted to some property offense within state law jurisdiction, clearly it did not amount to "common law larceny." (See R. 23, Tr. 3-27.) Petitioner's unsuccessful motions to dismiss and for a directed finding squarely present an issue ripe for decision. (R. 9, 14, 17; Tr. 27)

¹ "R." refers to the Record on Appeal on file with the Seventh Circuit in No. 77-1724, and "Tr." to the Transcript of Proceedings on May 27, 1977, contained as pp. 1-28 of the document numbered "23" of the said Record. (R. 23)

The Seventh Circuit panel's as-yet-unpublished Slip Opinion, set forth as an Appendix to this Petition, will be referred to as "App."

² App. 5.

REASONS FOR GRANTING THE WRIT

1.

The agreed facts fail to establish that petitioner committed larceny as known to the common law; thus there was a failure of proof that he committed the offense charged in the indictment under 18 U.S.C. 2113(b). The Seventh Circuit panel's conclusion that the said section encompasses takings not amounting to common law larceny is not compelled by any controlling authority from this Court, and directly conflicts with case law from the Fourth and Ninth Circuits.

Petitioner's conduct ("presenting false checks," R. 1) may constitute receiving stolen property or forgery under local law. The offense may have amounted to embezzlement via the "guilty teller." (Tr. 18-19) But because petitioner's conduct with respect to the bank's money does *not* amount to larceny as that offense was known to the common law, petitioner did not violate the statute as charged.

The statute, 18 U.S. Code 2113(b), iterates that:

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100.00 belonging to, or in the care, custody, control, management, or possession of any bank, . . ."

is guilty of a federal offense.

The indictment charges that petitioner stole money from the bank "by presenting false checks." Because the facts do not establish common law larceny,³ the indictment fails to allege an offense under section 2113(b). Petitioner's motion to dismiss should have been allowed, and his motion

³ The panel implicitly agrees that larceny was not established. (App. 2-3)

for directed finding likewise should have been sustained. (R. 9, 14, 17; Tr. 27)

• • •

To constitute the offense defined by section 2113(b), the facts alleged and established must demonstrate common law larceny, not just any random one of the many possible kinds of property offenses.

"[P]aragraph (b) of the bank robbery act [18 U.S.C. 2113(b)] reaches only the offense of larceny as that crime has been defined by the common law. It does not encompass . . . embezzlement . . . or obtaining goods by false pretense." *United States v. Rogers*, 289 F.2d 433, 437 (4 Cir. 1961).

In *Rogers*, the Fourth Circuit's conclusion was soundly based upon legislative history and principles of statutory construction.⁴ The court noted that the statutory language of section 2113(b), "whoever takes and carries away, with intent to steal and purloin," is the language of larceny. *Accord*, *United States v. Patton*, 120 F.2d 73 (3 Cir. 1941), wherein the Third Circuit held that a similar, predecessor statute was not violated by the cashing of altered and forged checks at a national bank.

Like the Fourth Circuit in *Rogers, supra*, the Ninth Circuit, in *LeMasters v. United States*, 378 F.2d 262 (9 Cir. 1967), definitively has held that conduct amounting to false pretenses (or other non-larceny property offense) did not violate section 2113(b), even though money from a bank was thereby obtained. In *LeMasters*, the court carefully examined the legislative history of the statute, concluding that no property offense other than larceny, as known to the common law, was intended to be covered by section 2113(b). Accordingly, the court reversed the conviction of defendant, whose conduct consisted (to be sure) of false pretenses—but *not larceny*. *Accord, re embezzlement, Ben-*

⁴ See *id.* at 437 nn. 9-14.

nett v. United States, 399 F.2d 740, 743-44 (9 Cir. 1968) (explicitly relying upon *LeMasters*).

LeMasters constitutes the considered judgment of the Ninth Circuit, expressly followed in *Bennett. Rogers*, from the Fourth Circuit,⁵ independently reaches the same result for the same logical reasons, based upon legislative history and principles of statutory construction.⁶ In similar fashion, the Third Circuit in *Patton, supra*, reached a comparable result under a predecessor statute.

The Seventh Circuit panel seeks solace in several decisions directly in conflict with *Bennett* and *LeMasters*, relying upon *Thaggard v. United States*, 354 F.2d 735 (5 Cir. 1965), and *United States v. Fistel*, 460 F.2d 157 (2 Cir. 1972). (App. 3-4)

The *LeMasters* court makes specific reference to *Thaggard*, overtly disagreeing with *Thaggard's* contrary holding and thereby creating a conflict betwixt the Circuits.⁷

The startling conflict amongst the several Circuits is one of the strong bases for the grant of certiorari, per Rule 19(b) of the Rules of this Court.

⁵ *Accord, United States v. Posner*, 408 F. Supp. 1145, 1149-50 (D. Md. 1976), following *Rogers*.

⁶ The government may call *LeMasters* a "maverick" decision" (R. 16, p. 1) until the cows come home; that does not make it so.

⁷ The Fourth and Ninth Circuits hold that only common law larceny is encompassed by 18 U.S.C. 2113(b). (*Rogers, LeMasters*, and *Bennett, supra*.) The Fifth and Second Circuits hold that the statute also includes conduct such as false pretenses or embezzlement not amounting to larceny, per *Thaggard* and *Fistel, supra*. The Third Circuit appears aligned with the Fourth and Ninth in support of petitioner's position here, per *Patton, supra*, but as this was under a different statute, the present Third Circuit position remains undetermined.

• • •

The *LeMasters* decision represents the better-reasoned, more sensible and correct of the diametrically opposed possible solutions to the problem at hand. The court characterized thus the defendant's position therein, and the argument advanced and its method of resolution apply equally at bar:

"In effect he contends that obtaining money from a bank by false pretense is not a federal crime. That does not mean that it can be done with impunity. No doubt such conduct is punishable in every state or other comparable government unit . . . But *federal criminal law is all statutory law*. **Our question, then, is whether section 2113(b), properly construed, covers and makes punishable the obtaining of money from a bank by false pretenses.** The question has no constitutional overtones." *LeMasters, supra*, 378 F.2d at 263-64. (Emphases added.)

Delving into legislative history, the court noted that the likelihood of dangerous activity involving threats to personal safety (assault, weapons, death, kidnaping) is considerable in larceny and burglary, as in robbery, cases; while "such likelihood [of dangerous activity] in cases of embezzlement or false pretenses, on the other hand, seems quite doubtful." *Id.* at 266. Congress could have included such other property offenses within section 2113(b), specifically having rejected such inclusion; therefore (concluded the Court), only larceny remains within the chosen statutory language. *Id.* at 266-68.

Refusing to read the statute as covering conduct comparable to that of petitioner at bar—i.e., conduct amounting to a property offense cognizable by local law but not amounting to common law larceny—the court held, in no uncertain terms:

"[S]uch an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law." *Id.* at 268.

Finally, the court held that this situation—i.e., resolution of the question whether specific property-offense conduct not amounting to larceny is within coverage of section 2113(b)—must be subject to “the oft cited canon of statutory construction that ambiguities in penal statutes are to be resolved in favor of the accused . . .” *Ibid.*

To the extent that the *LeMasters* court had the benefit of the *Thaggard* court’s thinking, and in view of the careful analysis contained in *LeMasters*, *LeMasters* represents the better-considered decision. *Thaggard* and *Fistel*, and now the Seventh Circuit in the case at bar, in direct conflict with *LeMasters*, *Bennett*, *Rogers*, (and, inferentially, *Patton*), should be rejected.

The Seventh Circuit panel’s analysis depends wholly upon lifting the logic from the Dyer Act line of cases⁸ and applying same to bank-property-offense cases.

But the logic, behind making any form of theft (a definition broader than common law larceny) of a vehicle subsequently moved in interstate commerce subject to coverage under the Dyer Act, depends, in turn, upon the context in which the phrase “steal” appears, by the Court’s own analysis of its logic. See *United States v. Turley*, 325 U.S. 407, 412-13 (1957): “Freed from a common law meaning, we should give ‘stolen’ the meaning consistent with the context in which it appears.” (Emphasis added.)

⁸ The Dyer Act is 18 U.S.C. 2312; the Supreme Court case relied on is *United States v. Turley*, 352 U.S. 407 (1957). (App. 3-4) But the “Bank Robbery Act” cases against petitioner’s position, *Thaggard* and *Fistel*, *supra*, relied upon by the panel, blindly lift the *Turley* analysis without regard to its context, which differs greatly from that of the instant act.

The statutory context in the instant case is:

“Whoever **takes and carries away**, with intent to steal or purloin . . .” (Emphasis added.)

This is the language of larceny; and absent any such functional context as cars moving about so as not easily to be subject to State criminal jurisdiction, the statute here requires the appropriate reading given it by *LeMasters*, *Bennett*, *Rogers*, and, by implication, *Patton*, *supra*. The considered treatment of the statute in these authorities should not be taken lightly.

Petitioner includes herewith verbatim “Law Dictionary” definitions of the pertinent terminology as additional demonstrative proof. While broader readings are possible, note the primary thrust of the phrases below.⁹

From BALLENTINE’S LAW DICTIONARY (3d ed. 1969):

“purloin (per-loin). To pilfer; to steal; to filch.” *Id.* at 1028.

“pilfer (pil/fer). To steal. [citations omitted] . . .” *Id.* at

“pilferage (pil/fer) *Larceny* or stealing . . .” *Ibid.*; emphasis added.

“filch. To steal, particularly something of petty value.” *Id.* at 471.

“steal. Verb: *To commit larceny.* . . . [citations only, omitted.]

To take without right or leave, with intent to keep wrongfully, the goods of another. . . . Noun: *A taking by larceny* or theft.

In the broad sense, any conversion of **embezzlement**. . . . A colloquial term for the obtaining of property for an inadequate consideration.

Having no common-law definition to restrict its meaning as an offense, the word ‘stealing’ is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin.” *Id.* at 1215; emphasis added.

(footnote continued)

Certiorari should be allowed for proper resolution of an important issue of federal statutory construction affecting the criminal justice system, where a conflict exists amongst the Circuits, and no authority from this Court presently controls. The conflict is so basic that the self-same conduct is or is not a federal crime, depending on whether one is in an area within the confines of the Second, Fifth and Seventh Circuits, on the one hand, or within the Fourth or Ninth Circuits, on the other. Such incongruity on something so basic as the elements of an offense ought not be tolerated by this Court, and certiorari should be allowed to assure uniformity in the application of the federal criminal law.

2.

The fatal variance between the judgment and commitment order on the one hand, and the indictment, on the other, vitiates the conviction; remandment for correction thereof is not sufficient to protect defendant, as the trial court's sentence might have been affected by the misnomer.

Agreeing with our position that the judgment and commitment order did not properly reflect the offense with

(footnote continued)

From BLACK'S LAW DICTIONARY (4th ed. 1957):

EIO = Emphases in original

"**STEAL** [EIO] This term is *commonly used* [EIO] in indictments *for larceny*, [EIO] (take, *steal*, [EIO] and carry away.) and denotes the commission of theft, that is, the felonious taking and carrying away of the personal property of another, and without right and without leave or consent of owner, . . . and with intent to keep or make use wrongfully, . . . ; or it may denote the criminal taking of personal property either by larceny, embezzlement, or false pretenses. . . . But, in popular usage 'stealing' may include the unlawful appropriation of things which are not technically the subject of larceny, *e.g.*, immovables . . ." *Id.* at 1583-84; [citations (only) omitted].

"**PURLOIN**. [EIO] To steal; to commit larceny or theft. . . . [citation only omitted.]" *Id.* at 1400.

which petitioner was charged and to which he pleaded guilty, the appeals court panel nonetheless prescribed inadequate relief: the cause is to be remanded with directions to correct the "discrepancy."¹⁰

But this is not enough; for it is entirely possible that the trial court's sentence may have been affected by the misconception that "robbery" was involved, although (of course) there was no force or threat to any person here. Yet within purview of the panel's remand order, all the District Court may do is correct the error in the order.

The remandment must, at the very least, encompass the possibility that this may have been the case, giving the lower court the authority and opportunity to correct the sentence as well without requiring petitioner to seek an alternate form of relief at this juncture.

The panel has ignored an earlier Seventh Circuit decision, *United States v. Buckley*, 379 F.2d 424, 427 (7 Cir. 1967), which supports our position that remand for resentencing (as well as for correction of the order itself) is necessary and appropriate to protect petitioner's rights.

CONCLUSION

Certiorari should be allowed to consider the issue of statutory construction herewith presented, especially where the Circuits have divided so sharply.

Respectfully submitted,

JULIUS LUCIUS ECHELES

CAROLYN JAFFE

Attorneys for Petitioner

¹⁰ App. 4.

APPENDIX

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 77-1724

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL EDWARD GUIFFRE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 77-CR-102—Bernard M. Decker, *Judge.*

Argued December 5, 1977—Decided May 19, 1978

Before FAIRCHILD, *Chief Judge*, TONE, *Circuit Judge* and
CAMPBELL, *Senior District Judge*.*

CAMPBELL, *Senior District Judge*. The indictment in this case charged that the defendant-appellant Michael Edward Guiffre violated 18 U.S.C. § 2113(b) by taking and carrying away with intent to steal approximately \$22,792.77. The indictment specified that the taking was accomplished by means of presenting false checks. Following a bench

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

trial on agreed facts, the district court found Guiffre guilty and imposed a sentence of six months' imprisonment to be followed by a two-and-one-half year period of probation. We affirm.

During June and July, 1976, defendant deposited twenty-three checks, which were stolen from the City of Chicago, into three separate accounts at the Melrose Park National Bank. Two accounts stood in the name of his wife, Anna Guiffre, and one account stood in the name of Raymond Gordon, an assumed name used by the defendant. Having deposited the stolen checks with forged endorsements into these accounts, Guiffre withdrew the money in varying amounts. Defendant conducted all his transactions at the bank with Deborah Baldassari, a teller, who knew the checks were stolen.¹

In relevant part, 18 U.S.C. § 2113(b) provides:

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both."

Guiffre contends that his conduct as charged in the indictment and proven at trial does not amount to larceny as that offense was known to the common law, and hence the indictment failed to allege and the evidence failed to establish an offense under 18 U.S.C. § 2113(b). Central to this contention is the assertion that 18 U.S.C. § 2113(b) only proscribes conduct amounting to common law larceny. We are thus called upon to determine whether the use of the

¹ The record showed that Baldassari assisted Guiffre in exchange for \$200.00. She was not charged with defendant, but instead was placed in the Pre-Trial Diversion Program.

words "takes and carries away, with intent to steal or purloin" serves to limit the applicability of 18 U.S.C. § 2113(b) to acts constituting common law larceny. We hold that the statute is not so limited.

In *United States v. Turley*, 352 U.S. 407 (1957), the Supreme Court was confronted with a similar issue involving the interpretation of the term "stolen" in the Dyer Act, 18 U.S.C. § 2312. In that case the Court held that the use of the term "stolen" did not serve to limit the application of the Dyer Act to takings which amounted to common law larceny. Rather, the Court stated that "'[s]tolen' as used in 18 U.S.C. § 2312 includes all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common law larceny". *Id.* at 417.

Relying on the Supreme Court's analysis in *Turley*, the Fifth and Second Circuits have held that 18 U.S.C. § 2113(b) is not to be so narrowly construed that its applicability is limited to only larceny as that crime was known to the common law. *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *Thaggard v. United States*, 354 F.2d 735, 736-738 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966). The Fourth Circuit has taken a contrary view and has stated in *dicta* that 18 U.S.C. § 2113(b) "reaches only the offense of larceny as that crime has been defined by the common law." *United States v. Rogers*, 289 F.2d 433, 437 (1961). *Rogers* neither mentions nor discusses *Turley*. Similarly, the Ninth Circuit in *LeMasters v. United States*, 378 F.2d 262 (1967), held that 18 U.S.C. § 2113(b) did not include obtaining money by false pretenses within the ambit of its proscription, but rather was limited in application to the offense of common law larceny. *Turley* was distinguished by *LeMasters* on the basis that the Dyer Act

involved in *Turley* required a broad construction of the word "stolen" in order to implement the policy underlying the Act. *Id.* at 267.

With all deference to the views expressed by the Fourth and Ninth Circuits, we believe that the better construction of the words "takes and carries away, with intent to steal or purloin" was afforded by the Second and Fifth Circuits in *Fistel* and *Thaggard*, respectively. Those decisions rely directly on the Supreme Court's interpretation in *Turley* of the term "stolen" as a basis for broadly interpreting the language of 18 U.S.C. § 2113(b) to apply to felonious takings with intent to deprive the owner of rights and benefits of ownership. In accord with *Fistel* and *Thaggard* we hold that 18 U.S.C. § 2113(b) is not limited in application to offenses amounting to common law larceny, but rather is applicable to the taking charged in the indictment in this case and established by the agreed facts.

While the indictment charged theft and the facts substantiated that charge, the judgment and commitment order indicates that defendant was convicted of "knowingly, willfully, and unlawfully robbing a Federally insured Bank." [App. 3] Defendant contends that the discrepancy between the offense charged (theft) and that of which he stands convicted per the judgment order (robbery) invalidates the conviction.² This is so, Guiffre argues, because the guilty finding operates as an acquittal of any lesser offenses which merge into the greater, and as to which no findings were entered. We do not agree.

The record does not reflect, and we fail to perceive, any prejudice to defendant as a result of the misdesignation of the crime of which he stands convicted. Although defen-

² Defendant did not move the district court to correct the judgment order pursuant to Rule 35 or 36, F.R.Crim.P.

dant asserts that the mis-characterization of the offense may have a bearing on punishment, this assertion ignores the fact that defendant remains free on bond pending the outcome of this appeal, and that any arguable defect in the judgment and commitment order can be easily remedied by remanding the case to the district court for purposes of correcting that order. See: *United States v. Dandridge*, 437 F.2d 1324 (7th Cir. 1971).

Defendant also contends that the sentence imposed by the district court should be vacated as excessive. We find no merit to this contention.

For the foregoing reasons, defendant's conviction is affirmed. The cause is remanded to the district court for the sole purposes of correcting the judgment and commitment order.

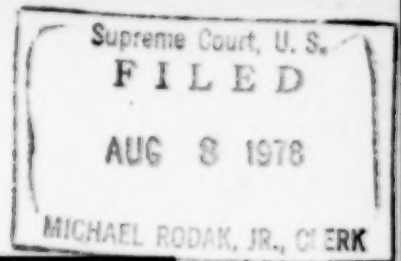
AFFIRMED, REMANDED WITH DIRECTIONS.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

No. 77-1778



In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL EDWARD GUIFFRE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1778

MICHAEL EDWARD GUIFFRE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner contends that his conviction for bank larceny under 18 U.S.C. 2113(b) must fall because his culpable acts did not constitute common law larceny.¹

Following a jury-waived trial upon stipulated facts in the United States District Court for the Northern District of Illinois, petitioner was convicted of taking and carrying away, with intent to steal, approximately \$22,000 by presenting false checks to a federally insured bank, in

¹18 U.S.C. 2113(b) provides:

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both * * *.

violation of 18 U.S.C. 2113(b). He was sentenced to six months' imprisonment to be followed by two and one half years of probation. The court of appeals affirmed (Pet. App.).

During June and July of 1976, petitioner deposited 23 checks which were stolen from the City of Chicago and which contained forged endorsements. The checks were deposited in three separate accounts at the Melrose Park National Bank. Petitioner thereafter withdrew the money from these accounts in varying sums. He conducted all of these transactions with the assistance of Deborah Baldassari, a teller, who knew the checks were stolen but cooperated with petitioner in return for \$200 (Pet. App. 2).

1. Petitioner contends that since he did not commit common law larceny, the holding of the court below that he was nevertheless properly convicted under the bank larceny statute was error and deepened an already existing conflict among the circuits on this issue. But his basic premise is erroneous: petitioner's conduct did amount to common law larceny (Pet. App. 2-3).

Petitioner cashed all of the checks with the assistance of an employee of the bank who knew the truth. The case is thus critically different from that in which a teller is duped by a forged signature, a switched bank note, or an impersonation and, believing the transaction to be lawful, willingly consents to give possession of the bank's money to another. Here, the teller's knowledge that the checks were stolen deprived her of all right to give valid consent on behalf of the bank. From the earliest times such a scheme has been held to be a trespassory taking and both the teller and his cohorts are guilty of larceny. See, generally, *The King v. Bazeley*, 2 Leach 835, 168 Eng. Rep. 517; Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469 (1976). Every circuit that has considered the issue has agreed that the taking of money from a bank with the assistance of a teller is both a

larceny at common law and a violation of 18 U.S.C. 2113(b). *United States v. Bowser*, 532 F. 2d 1318, 1320-1321 (C.A. 9). Accord, *United States v. Brown*, 455 F. 2d 1201 (C.A. 9), certiorari denied *sub nom. Payne v. United States*, 406 U.S. 960; *United States v. Pruitt*, 446 F. 2d 513 (C.A. 6); *Williams v. United States*, 402 F. 2d 258 (C.A. 5); *Rizzo v. United States*, 304 F. 2d 810 (C.A. 8). Indeed, the Ninth Circuit, upon which petitioner relies, distinguished its decision in *LeMasters v. United States*, 378 F. 2d 262 (C.A. 9), upon this ground (532 F. 2d at 1320-1321; footnotes omitted):

But in turning over the bank's money to one obviously entitled to neither its benefits nor its possession, [the teller] was not representing the bank but was acting adversely to it by aiding in accomplishing a trespassory taking and carrying away of bank property.

Perhaps from as early as *The Carrier's Case* in 1473, most common law courts would have thought the circumstances sufficient to establish the offense of larceny * * *. To establish that the gist of the present case is bank larceny pure and simple, resort need not be had to any expansion of the statute in question [18 U.S.C. 2113(b)] by reference to legislative history or general purpose. The authorities primarily relied upon by appellant * * * demonstrate the significant distinctions.

In *LeMasters* the defendant was charged with bank larceny in claimed violation of § 2113(b) and with related offenses, as in the present case. However, in that case the facts in no way suggested a trespassory taking.

Since the offense admitted constitutes common law larceny, an act clearly falling within the prohibition of

Section 2113(b), there is no occasion for this Court to consider the allegedly conflicting dicta in several circuits that Section 2113(b) does not reach beyond common law offenses.

2. Petitioner also argues (Pet. 10-11) that the court of appeals acted improperly in remanding the case to the district court for the sole purpose of correcting the commitment order, which mischaracterized the offense as "robbery" rather than theft. Petitioner suggests that his sentence may have been affected by the misdesignation. As the court of appeals pointed out, however, a sentence of only six months belies the possibility of such prejudice. At all events, the proper remedy is for petitioner to bring a motion under Fed. R. Crim. P. 35 for the correction or reduction of sentence, so that the trial judge may have the opportunity to address the issue of whether he was affected by the misdesignation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WADE H. MCCREE, JR.,
Solicitor General.

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